83-1541

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

PEARL JEAN MCNEIL PORTER,
Petitioner

v.

THE STATE OF NORTH CAROLINA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA
AND THE COURT OF APPEALS OF
NORTH CAROLINA

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QUESTION PRESENTED

Is contraband found in the personal effects and luggage of an airline passenger constitutionally admissible at her criminal trial where the evidence is obtained after: (1) The passenger is seized by nine law enforcement officers acting on the basis of an articulable suspicion that the passenger is carrying drugs; (2) The officers block her from leaving the main door of the terminal; (3) The officers take her to a law enforcement office in the terminal and search her personal effects in the office; (4) The officers seize her luggage from the airline without a warrant; (5) The officers interrogate her without giving her Miranda warnings and after she has asked to consult a lawyer; (6) The officers hold her luggage without a warrant for over five hours; and (7) The officers then obtain a warrant to search the luggage utilizing in the search

warrant application evidence found during the office search of her personal effects without a warrant and her answers obtained during the office interrogation?

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA
AND THE COURT OF APPEALS OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Pearl Jean McNeil Porter, the Petitioner herein, prays the a Writ of Certiorari issue to review the judgment and order of the Supreme Court of North Carolina, which was filed in this proceeding on January 23, 1984, dismissing the Petitioner's appeal and denying the Petitioner's petition for discretionary

review of the opinion and judgment of the Court of Appeals of North Carolina, which latter opinion and judgment was filed in this cause on November 15, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals of North Carolina is reported at ____ N.C. App. ____, 308 S.E.2d 767 (1983), and is reproduced in Appendix A. The dismissal by the Supreme Court of North Carolina of the Petitioner's appeal and denial of her petition to the Supreme Court of North Carolina for discretionary review in this case is reported at ____N.C. ____, ____S.E.2d ____ (1984), and is reproduced in Appendix B.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on January 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Involved in this petition for writs of certiorari are the Fourth and Fifth Amendments to the U.S. Constitution insofar as they embody fundamental rights guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution.

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment provides, insofar as is here pertinent:

> No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...

The Fourteenth Amendment provides, in pertinent part:

> Section 1. ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

The Petitioner Pearl Jean McNeil Porter was convicted in the Superior Court of Wake County, North Carolina, for the felony of trafficking in the controlled substance heroin, and misdemeanor possession of hashish.

On January 21, 1982, shortly after 9:00 p.m., Mrs. Porter was seized by several law enforcement officers as she attempted to leave the front door of the main terminal building of the Raleigh-Durham North Carolina Airport. As Mrs. Porter approached the door that led to the parking lot of the airport, Detective Sgt. Peoples of the Raleigh Police called her name and stopped her. Special Agent Turbeville of the North Carolina State Bureau of Investigation

stepped in front of Mrs. Porter and cut off her progress out the door. Detective O'Shields of the Raleigh Police was with the other two officers when Mrs. Porter was stopped. Six other law enforcement officers were also nearby and involved in the surveillance. Mrs. Porter knew both O'Shields and Peoples and knew that they were police officers. As he stood in front of her, Turbeville showed Mrs. Porter his State Bureau of Investigation credentials. Turbeville then asked Mrs. Porter for some identification and for her airplane ticket. Mrs. Porter responded that she had left her ticket on the plane. Turbeville and the other officers then asked Mrs. Porter to accompany them to the SBI office which was located near the baggage claim area in the main airport terminal. None of the officers possessed either an arrest or a search warrant for Mrs. Porter or any of her belongings at the time she was seized in the airport.

(Suppression hearing transcript, pp. 45, 77, 93-96, & 31.)

At the time the above happened, Turbeville suspected that Mrs. Porter might be transporting drugs from New York to Raleigh. This suspicion stemmed from two sources. Both sources supplied their information to Turbeville at a time that was remote to January 21, 1982. The first source was a police detective Privette, who told Turbeville that he suspected various people engaging in narcotics trafficking in the Raleigh area. Among the people mentioned by Privette were Mrs. Porter and her husband. This information had been given to Privette by a confidential informant of his. This second hand information was supplied to Turbeville some three weeks before Mrs. Porter was seized in the airport. The reliability of Privette's informant is not a matter of record. (Suppression hearing

transcript, p. 23.) There is absolutely no information available concerning the credibility, reliability, or underlying source of information that Privette's informer supplied to him, which was in turn conveyed by Privette to Turbeville.

Turbeville's second source was a "long time confidential source" of his. (Suppression hearing transcript, p. 24.) This source told Turbeville a week earlier that Mr. and Mrs. Porter had allegedly been bringing narcotics into the Raleigh-Durham Airport and that they usually came back on a Thursday or a Friday. (Id.) Turbeville was not given any specific information regarding any particular day or time that the Porters would supposedly be bringing narcotics into the area using the airport. Turbeville apparently did not consider the informant's tip sufficient to cause him to make any specific investigation of Mrs. Porter or her husband. He merely "put

[the information] in the back of [his] mind and that was it." (Suppression hearing transcript, p. 24.)

Some five hours before Turbeville and the other officers seized Mrs. Porter at the airport, Turbeville had seen Mrs. Porter's husband, Elbert Porter, and one of the men in the concourse area of the airport. Turbeville then telephoned Detective Privette and requested the assistance of the Raleigh Police because he wanted officers with him who would be able to identify Mrs. Porter on sight. (Suppression hearing transcript, pp. 26, 117.) O'Shields and Peoples, along with three other Raleigh police officers, a sheriff's deputy, and two uniformed airport police officers were stationed in the airport to assist Turbeville in the apprehension of Mrs. Porter if she showed up and deplaned. (Suppression hearing transcript, pp. 93-96.)

Mrs. Porter did arrive on an Eastern Airlines flight from New York that landed at Raleigh-Durham about 9:00 p.m. Turbeville, O'Shields, and a third officer observed Mrs. Porter as she got off the aircraft and walked from the gate area through the terminal of the airport. Mrs. Porter was carrying a handbag and a wrapped package. Mrs. Porter was met by an elderly man, who was never identified, but who had been five hours before in the company of Elbert Porter. Mrs. Porter, without speaking, gave the elderly man the wrapped package and he carried it for a short time, then handed it back to Mrs. Porter. When the package was handed back to Mrs. Porter, she started out the front door; it was at this point the officers accosted her and asked her to proceed to the SBI office. (Suppression hearing transcript, pp. 28-29.)

When Mrs. Porter was seized by the

officers, she was not informed that she could refuse to speak with them if she so chose. She was not informed that she was free to leave if she wanted. (Suppression hearing transcript, p. 46.) Agent Turbeville testified at the suppression hearing in this case that he would not have let her leave even if she had wanted to, because he was determined at that point to find out whether Mrs. Porter possessed heroin either on her person or in any luggage that she may have checked aboard her flight. (Suppression hearing transcript, p. 47.) Turbeville further testified that his investigation had focused specifically on Mrs. Porter at the time of her seizure in the airport. (Suppression hearing transcript, p. 46.)

Moreover, Mrs. Porter testified at the suppression hearing, and stated that she did not believe she was free to leave had she wanted to at the time the officers accosted her. (Suppression hearing trans-

script, pp. 123-124.)

When Mrs. Porter was asked to go to the SBI office in the airport, no less than seven law enforcement officers accompanied her there. (Suppression hearing transcript, p. 130.) Mrs. Porter went with them because she was surrounded and she thought she had no right to refuse to accompany the officers. (Suppression hearing transcript, pp. 125-128.) Turbeville testified that he thought, at the time, he had sufficient information not to let Mrs. Porter leave, had she attempted to do so. (Suppression hearing transcript, pp. 60-61.)

When Mrs. Porter was taken into the SBI office, Agent Turbeville told her that he was conducting a narcotics investigation. Turbeville then asked to look inside Mrs. Porter's handbag and also in the wrapped package that she had been carrying. Mrs.

Porter allowed him to do so. The wrapped package contained a punch bowl and nothing more. In her handbag, Turbeville found a tin foil package; he unwrapped it without asking Mrs. Porter permission to do that; and a small amount of hashish was discovered therein. Turbeville then left the SBI office, although Mrs. Porter remained there in the company of at least one law enforcement officer. (Suppression hearing transcript, pp. 52-53.) Turbeville checked all of the bags in the Eastern Airlines baggage claim area and found one that bore a woman's name on it. Turbeville seized that bag from Eastern Airlines without a warrant and carried it into the office where Mrs. Porter was being detained. (Suppression hearing transcript, pp. 67-68.) At the suppression hearing, Turbeville first testified that he seized the bag after Elbert Porter had been located in the parking lot, had been brought into the airport area by another

officer, and had pointed out the seized bag as being that of his wife. On cross-examination, after being shown the SBI report which he dictated shortly after the day in question, Turbeville admitted that he was in error, and stated that the correct chronology was as reflected in the report. According to the report, Turbeville first seized the bag, and then carried it into the office where Mrs. Porter was being held. He then asked Mrs. Porter if the bag was hers. She denied it. Then Mr. Porter was brought from the parking lot into the airport, and Mr. Porter did identify the bag as being his wife's. (Suppression hearing transcript, pp. 111-116.)

At the time Turbeville returned to the office area with the brown leather suitcase, the hashish had already been discovered in Mrs. Porter's handbag. (Suppression hearing transcript, p. 36.) Agent Turbeville testified that Mrs. Porter had been formally

arrested for misdemeanor possession of hashish immediately after the discovery of same. (Suppression hearing transcript, pp. 113-114.) Without first advising Mrs. Porter of her Miranda rights, and following her formal arrest for the hashish, Turbeville questioned Mrs. Porter about the brown leather luggage and whether it belonged to her. At this point, according to Turbeville's testimony, Mrs. Porter asked to speak with an attorney. Turbeville, however, did not allow her to get in touch with a lawyer at that time. Rather, by his own admission, he said that there would be "plenty of time for that." (Suppression hearing transcript, pp. 36-41.) Agent Turbeville testified that Mrs. Porter was never advised of her rights under Miranda while she was at the airport. (Suppression hearing transcript, p. 53.) Yet after Mrs. Porter had been placed under formal arrest for the hashish, and after she had requested the assistance of counsel,

Turbeville continued to question Mrs. Porter about the brown leather bag seized from the luggage area. (Suppression hearing transcript, pp. 36-37, 53.)

The door to the office where Mrs. Porter was being held was kept closed at all times, except when a law enforcement entered or exited. (Suppression hearing transcript, p. 57.) Mrs. Porter testified at the suppression hearing that the brown leather fold-up bag or suitcase was indeed hers. It had been checked with Eastern Airlines in New York when Mrs. Porter bought her ticket. (Suppression hearing transcript, pp. 5-6, 10.) The next time Mrs. Porter saw her suitcase, after checking it, was when it was brought into the SBI office by Turbeville. (Suppression hearing transcript, p. 9.) According to Mrs. Porter's testimony, she asked to speak with a lawyer prior to being questioned about the ownership of the

brown leather bag. According to both her testimony, and that of Agent Turbeville, she was never permitted to speak with a lawyer while she was held at the airport. After Mrs. Porter had been formally placed under arrest by Agent Turbeville and had again asked for the assistance of a lawyer, Turbeville questioned her about the bag. Without having received advise of counsel, or having been warned of her Miranda rights, she denied ownership of the bag at that point. (Suppression hearing transcript, pp. 36-37.)

Law enforcement officers, still acting without any warrant, then took the suitcase which they had seized to the Wake County Sheriff's Department. Thereafter, Turbeville applied for and obtained a search warrant to actually search the brown leather fold-up suitcase. (Suppression hearing transcript, p. 37.) A search of the suitcase pursuant to the search warrant revealed the presence

of a white powder substance that was chemically analyzed and found to be 27.9 grams of a mixture containing the controlled substance heroin. (Suppression hearing transcript, p. 40.) The application for the search warrant itself recited as one of the bases of probable cause to search the bag the fact that a misdemeanor amount of hashish had been found in Mrs. Porter's handbag.

Mrs. Porter was tried for the felony of trafficking in heroin, and the misdemeanor possession of the small amount of hashish. Prior to trial, she moved to suppress all evidence obtained as a result of her seizure at the Raleigh-Durham Airport, including all statements which she made to the officers, the fruit of the search of her handbag, and the fruit of the search and seizure of her brown leather suitcase. An evidentiary hearing was held on these

motions in the Superior Court of Wake County on August 9, 1982. At the conclusion of the hearing, the state trial judge denied all of defendant's motions to suppress. At Mrs. Porter's trial, which resulted in a conviction on both charges, each of the items of evidence and all of the statements were offered and admitted into evidence.

Following Mrs. Porter's conviction in the Superior Court of Wake County, she appealed to the Court of Appeals of North Carolina, assigning as error and briefing the search, seizure, and Miranda questions involved in her fact situation. The Court of Appeals found no error, and affirmed her convictions. Thereafter, because this matter involved federal constituional questions, Mrs. Porter appealed as of right to the Supreme Court of North Carolina and filed also an alternative petition to the Supreme Court of North Carolina for discretionary

review of the Court of Appeals' decision. The Supreme Court of North Carolina dismissed Mrs. Porter's appeal without briefing or oral argument, and denied the petition for discretionary review.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI OUGHT TO BE GRANTED BECAUSE THE DECISIONS BELOW ARE IN CLEAR CONFLICT WITH AND IGNORE THIS COURT'S RECENT DECISION IN FLORIDA V. ROYER.

In this case, the Court of Appeals of North Carolina held that an individual may be seized, taken to, and held in a law enforcement office even though there is only "reasonable and articulable suspicion that the person seized is engaged in criminal activity." 308 S.E.2d at 771. Such a holding in this case is clearly contrary to this court's own very recent decision in Florida v. Royer, ____U.S. ____, 103 S.Ct. 1319 (1983), a case which has been totally

ignored by the North Carolina courts. The opinion in Royer clearly stated that:

> Terry [v. Ohio, 392 U.S. 1 (1968)] and its progeny nevertheless created only limited exceptions to the general rule that seizures of the person require probable cause to arrest. Detentions may be "investigative" yet violative of the Fourth Amendment absent probable cause. In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest.... Reasonable suspicion of crime is insufficient to justify custodial interrogation even though the interrogation is investigative. [Emphasis added.]

Royer, supra, ____U.S. at ____, 103 S.Ct. at 1325. The Court also noted in Royer, ____ U.S. at ____, 103 S.Ct. at 1326:

> It is the state's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.

(Emphasis added).

The North Carolina courts below thus committed a fundamental error of constitu-

tional analysis by failing to even consider the impact of Royer on the facts of this particular case. The decision of this Court in Reid v. Georgia, 448 U.S. 438 (1980), relied upon by the North Carolina courts for the astounding proposition that the full-blown search and seizure of the defendant here on mere suspicion was not unconstitutional, merely states that: "in some circumstances a person may be detained briefly, without probable cause to arrest him...." Id. at 442 (emphasis added).

The trial court's conclusions of law, quoted in the Court of Appeals' opinion below, clearly are not supported by the evidence in this case as testified to by both the arresting officer, Agent Turbeville, and by the defendant herself. The undisputed evidence adduced at the suppression hearing show the following: (1) At the time Mrs. Porter was stopped on her way out the front door of the airport, three officers accosted

her and six others were stationed nearby to aid in her apprehension. (Suppression hearing transcript, pp. 93-96.) (2) Agent Turbeville blocked Mrs. Porter from leaving the airport and identified himself as a law enforcement officer. (Suppression hearing transcript, p. 77.) (3) While two of the officers with Turbeville knew Mrs. Porter and she knew them to be policemen, Turbeville nevertheless asked Mrs. Porter to produce identification and her airplane ticket. (Suppression hearing transcript, p. 31.) (4) Turbeville admitted at the suppression hearing that he was engaged in more than a Terry-type brief stop, in that he would not have permitted Mrs. Porter to leave had she attempted to do so because "he was determined" to find out whether Mrs. Porter was carrying any heroin on her person or in her luggage. (Suppression hearing transcript, pp. 46-47.) (5) Mrs. Porter herself felt she had been arrested in that

she did not believe she was free to go, and she believed she was in the custody of law enforcement officers at the point they blocked her from leaving the airport. (Suppression hearing transcript, pp. 123-124.) While Mrs. Porter agreed to accompany the law enforcement officers, her "agreement" was predicated on the fact that she was surrounded and she thought she had no right to refuse. (Suppression hearing transcript, pp. 125-128.) A reasonable person in the same situation would certainly have thought exactly as did Mrs. Porter. (6) Mrs. Porter in the SBI office at the airport was always in the custody of at least one, and usually several, law enforcement officers. (Suppression hearing transcript, pp. 52-53.) (7) Agent Turbeville seized Mrs. Porter's bag from Eastern without a warrant and without Mrs. Porter's permission. (Suppression hearing transcript, pp. 67-68.) (8) The

door of the SBI office at the airport was kept closed at all times when Mrs. Porter was there, and she was never told that she was free to leave if she wished to do so. (Suppression hearing transcript, p. 57.) (9) While the evidence is in dispute as to whether Mrs. Porter actually "permitted" Turbeville to search her handbag, she was clearly in custody in the SBI office at the time the search occurred, and hence the search of the handbag was the fruit of the illegal seizure of Mrs. Porter's person and handbag. Never did the law enforcement officers give her any Miranda warnings at the airport. (Suppression hearing transcript, pp. 113-114.) (10) Mrs. Porter's luggage was seized without a warrant and without her permission, and was held from approximately 9 p.m. on January 21, until 2:04 a.m. the next day before a search warrant was obtained to actually search the luggage. (Court of Appeals' opinion, 308 S.E.2d at 769-770.)

While the trial court found, erroneously, that the officers had probable cause to seize Mrs. Porter for trafficking in some form of controlled substances at the time she was accosted in the airport, at least the Court of Appeals' opinion itself recognizes that such conclusion is clearly wrong -- and instead the opinion below is grounded upon the purported right of law enforcement officers to seize and search a person and his or her effects merely upon "reasonable suspicion." Were this actually the state of the law in this nation, then there would no longer be any need whatsoever to analyze a search and seizure question in terms of probable cause; the Court of Appeals' opinion below has diluted the requirement of probable cause for the type of law enforcement activity here involved down to mere reasonable suspicion.

The decision by the North Carolina courts below on this fact situation also

plainly runs afoul of a number of other clear decisions from this Court in the search and seizure area. In both Dunaway v. New York, 442 U.S. 200 (1979) and Brown v. Illinois, 422 U.S. 590 (1975), this Court disapproved of arrests or seizures amounting to the intrusiveness of an arrest made merely for "investigatory purposes." In Ybarra v. Illinois, 444 U.S. 85 (1979), this Court was careful to maintain the narrow scope of the Terry v. Ohio exception to the requirement of full probable cause.

The intrusiveness involved in the capture of Mrs. Porter was a substantial law enforcement intrusiveness for many of the same reasons that the stop of a motorist's automobile constituted a seizure in Delaware v. Prouse, 440 U.S. 648 (1979). The involvment of a total of nine law enforcement officers, three of whom surrounded Mrs. Porter, and stopped her from leaving the airport door as she was fixing to do,

was beyond cavil "unsettling show of authority." 440 U.S. at 657. Moreover, Turbeville's blocking of Mrs. Porter's path through the front door substantially interfered with her freedom of movement, was inconvenient, took up a substantial portion of her time, and created substantial anxiety in her. 440 U.S. at 657. Acquiescence by Mrs. Porter to such a show of authority cannot, as the North Carolina courts seem to hold, substitute for free and voluntary consent. See United States v. Berry, 670 F.2d 583, 596 (5th Cir. 1982), citing Bumper v. North Carolina, 391 U.S. 543, 548-549 (1968).

In the final analysis, the fact situation in the instant case is almost identical to that in Florida v. Royer. If anything, the law enforcement conduct in the instant case is even more substantial an intrusion than that which occurred in Royer. Here, unlike Royer, a very large number of

officers stopped and accompanied Mrs. Porter to the law enforcement office at the airport. In Royer, there were only two officers involved. Here, like Royer, "...the primary interest of the officers was not in having an extended conversation with [Porter] but in the content of [her] luggage...." _____ U.S. at ____, 103 S.Ct. at 1328. From Agent Turbeville's own testimony, Turbeville's main interest was discovering whether Porter had heroin on her person or in her luggage: his real interest was in searching Mrs. Porter and her handbag and wrapped package, and also in seizing her checked luggage and searching that -- all of which was accomplished as the fruit of the initial seizure of Mrs. Porter on less than probable cause.

Just as in Royer, then, there can be no tenable argument that Mrs. Porter freely consented to the law enforcement officers' search of her handbag or other belongings.

Her acquiescence was merely the fruit of the original unconstitutional seizure. Yet the fact that hashish was found in the handbag was later utilized in the affidavit for the suitcase search warrant. Moreover, the seizure of Mrs. Porter's brown leather suitcase bag from Eastern Airlines without a search warrant authorizing such seizure was unconstitutional, and the fact that later a search warrant was obtained cannot cure the initial unconstitutionality. A seizure of the suitcase as occurred here is presumptively unreasonable and unconstitutional without a warrant in the absence of one of the recognized exceptions to the search warrant requirement of the Fourth Amendment. United States v. Jeffers, 342 U.S. 48 (1951). The exceptions, of course, none of which are here present, are as follows: (1) Search incident to a lawful arrest, Chimel v. California, 395 U.S. 752 (1969); (2) Searches conducted under exigent circumstances, Carroll v.

United States, 267 U.S. 132 (1925); (3) Consent searches, Davis v. United States, 328 U.S. 582 (1946); (4) Seizures of contraband in plain view, Coolidge v. New Hampshire, 403 U.S. 443 (1970), (5) Border searches, Boyd v. United States, 116 U.S. 616 (1886); and (6) "Hot pursuit" searches, Warden v. Hayden, 387 U.S. 294 (1967).

Since the search of the suitcase, even under a warrant, was the fruit of its illegal seizure from Mrs. Porter's lawful bailee, Eastern Airlines, the heroin found inside the suitcase should have been suppressed, since it was "come at by the exploitation" of the illegal act of the officers in seizing the bag in the first place without any lawful right to do so. Wong Sun v. United States, 371 U.S. 471 (1963).

It should be pointed out that the trial court denied Mrs. Porter's motion to suppress the suitcase contents in part because the trial court found she had abandoned standing

in it by denying, under in-custody interrogation, that same was hers. The North Carolina Appellate Courts, however, did not uphold this portion of the trial judge's suppression ruling. It is clear from both Mrs. Porter's and Agent Turbeville's testimony that Mrs. Porter was questioned about her ownership of the bag after she had invoked her right to counsel. Further, it is clear from both of their testimony that Mrs. Porter was never advised of her Miranda rights. Thus, the police interrogation procedure of Mrs. Porter was clearly unconstitutional. Rhode Island v. Innis, 446 U.S. 291 (1980); Fare v. Michael, 442 U.S. 707 (1979); Miranda v. Arizona, 384 U.S. 436 (1966).

Any denial by Mrs. Porter of ownership of the suitcase at the airport was thus produced as a result of the illegal and unconstitutional actions of the law enforcement officers in illegally seizing her in

the first instance, and then compounding this by unconstitutionally and illegally conducting incustodial interrogation of Mrs. Porter in the absence of Miranda warnings and in the face of Mrs. Porter's request to consult with an attorney before she answered questions about the suitcase. Thus, there can be no finding that Mrs. Porter voluntarily abandoned her expectation of privacy in her suitcase. Indeed, prior North Carolina precedence is to this effect. See State v. Cooke, 54 N.C. App. 85, 282 S.E.2d 800, 808 (1981), wherein the North Carolina Court of Appeals said:

> The lack of probable cause to seize Cooke's suitcase and the threat that an illegal search was about to take place preclude a finding in this case that Cooke's denial of ownership was a voluntary abandonment extinguishing his reasonable expectation of privacy in the area searched. In fact, strongest of inferences is that his conduct was a direct result of the illegal stop and seizure by the police.

(Affirmed 306 N.C. 132, 291 S.E.2d 618 (1982).)

II. EVEN THOUGH THE SUITCASE WAS ULTIMATELY SEARCHED UNDER COLOR OF A SEARCH WARRANT, THE SEARCH WARRANT WAS NOT SUFFICIENT TO ESTABLISH PROBABLE CAUSE, AND SIGNIFICANT PORTIONS OF THE SEARCH WARRANT WERE TAINTED BY THE ILLEGAL SEARCH WARRANT CONDUCT AND INTERROGATION BY LAW ENFORCEMENT OFFICERS.

As has been noted supra, the actual search of the suitcase itself more than five hours following its warrantless seizure was accomplished under color of a search warrant. The hand-written search warrant is set out at pages 7-10 of the Record on Appeal. Said search warrant, as the basis for probable cause, sets out that Agent Turbeville had received a tip from a confidential informant that Pearl Jean Porter is making trips into Raleigh-Durham Airport from New York City carrying controlled substances, mainly heroin. The trips were supposed to be made on Thursdays. The informer further said, according to the search warrant application, that Mrs. Porter was picked up at the airport by her husband,

Elbert Porter, and Eugene or Odell Willis. That is the extent of the informant's information provided in the search warrant application. Nowhere does the search warrant application state that the informant has ever proved reliable in the past, nor from where the informant got his information. The Court of Appeals in its opinion below found the informant to be reliable based on Turbeville's testimony at the suppression hearing, but no indicia of reliability was provided the magistrate at the time the search warrant was applied for and issued. Moreover, neither in the search warrant application nor in the suppression testimony does Turbeville reveal from what source his informant obtained the information he was passing along. The second informant, about whom Turbeville was told by a Raleigh police officer, is not even mentioned in the search warrant application. Consequently, the informant's tip fails to establish probable cause, even under

the relaxed standard recently announced by this Court in Illinois v. Gates, ____ U.S. ____, 103 S.Ct. 2317 (1983).

In addition to the informer's scanty information, Turbeville set out as a basis for probable cause his search of Mrs. Porter and her personal effects and the finding of approximately 2 grams of hashish in her purse after Mrs. Porter was taken to the SBI airport office. Then, as a further basis of probable cause, Agent Turbeville sets out in the search warrant application certain statements Mrs. Porter made during the in-custody interrogation, without, of course, informing the magistrate that she had not been advised of her Miranda rights prior to the interrogation, nor had interrogation ceased upon Mrs. Porter's request to consult with a lawyer. Turbeville sets out certain things Mrs. Porter stated, which, upon checking them out, Turbeville found out not be true.

Thus, the bases for the issuance of the search warrant by the magistrate were as follows: (1) The informer's tip, where neither the informer's reliability nor his source of information were provided the magistrate; (2) The search and finding of the controlled substance hashish in Mrs. Porter's handbag after she had been seized and taken to the law enforcement office; (3) Certain apparent untruths Mrs. Porter told during an unconstitutional interrogation of her; and (4) The seizure without a warrant by law enforcement officers over five hours previously of Mrs. Porter's luggage from Eastern Airlines.

It goes almost without saying, although the North Carolina Appellate Courts chose to ignore these shockingly unconstitutional procedures, that the basis for the issuance of the search warrant was tainted by a number of illegal acts by the law enforcement officers in clear violation of clear deci-

sions from this Court.

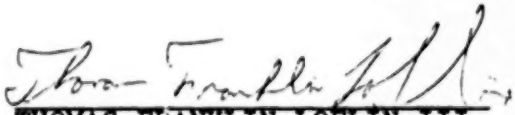
In the first place, as has been noted, the informer's tip is worthless to establish probable cause. In the second place, whatever probable cause may have been established by the hashish in Mrs. Porter's handbag was probable cause unconstitutionally obtained as a result of the search of the handbag's being the fruit of an illegal seizure of Mrs. Porter and her handbag without probable cause in violation of the Fourth Amendment and specifically Royer, supra. In the third place, whatever indicia of probable cause may have been provided by Mrs. Porter's apparently untrue statements, such statements were a violation of the Fifth Amendment to the Constitution of the United States, under this court's decisions in Miranda, supra; Innis, supra; and Fare, supra. Additionally, even apart from the Fifth Amendment argument is the fact that all statements Mrs. Porter made were made in violation of the Fourth

Amendment because they were the product of her original unconstitutional seizure. See Dunaway v. New York, supra. And, finally, the warrantless seizure and detention of Mrs. Porter's luggage for over five hours prior to an attempt to get a search warrant from the magistrate violates this court's recent decision in United States v. Place, ____U.S. ____, 103 S.Ct. 2637 (1983). The Court of Appeals below seeks to distinguish Place on the grounds that law enforcement officers actually had probable cause to seize Mrs. Porter's luggage; but that court overlooks the fact that any so-called "probable cause" was developed as a result of the illegal seizure and subsequent illegal search and questionning of Mrs. Porter on mere "suspicion" without probable cause.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that her peti-

tion for writ of certiorari be granted. Because this case involves fundamentally a question of Fourth Amendment law, this is the Court of last resort for her. Stone v. Powell, 428 U.S. 465 (1976), rehear. den. 429 U.S. 874.



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APPENDIX A

NO. 8310SC132

NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 1983

STATE OF NORTH CAROLINA

v. Wake County
Nos. 82CRS4462
82CRS12798

PEARL JEAN McNEIL PORTER

Appeal by defendant from Brewer, Judge. Judgment entered 24 September 1982 in Superior Court, Wake County. Heard in the Court of Appeals 18 October 1983.

On the evening of 21 January 1982 defendant was questioned by law enforcement officers at Raleigh-Durham Airport. After conferring with defendant, the officers searched her purse and a suitcase identified as belonging to defendant. As a result of these searches defendant was charged with misdemeanor possession of hashish and trafficking in heroin. She pleaded guilty to the misdemeanor and was fined

$100. A jury found defendant guilty of trafficking in heroin, and the trial court sentenced her to 18 years.

Attorney General Edmisten, by Special Deputy Attorney General Lester V. Chalmers, Jr., for the State.

Loflin & Loflin, by Thomas F. Loflin, III and Robert S. Mahler for defendant appellant.

ARNOLD, Judge.

The first question before this Court is whether the trial court erred in denying defendant's pretrial motions to suppress the hashish found in defendant's purse, the heroin found in the suitcase and all statements made by defendant after the law enforcement officers approached her. Defendant further questions the admission of certain evidence at trial, the sufficiency of the evidence to support her conviction and the constitutionality of the sentencing provisions in G.S. 90-95. After careful consideration of these assignments of error, we conclude that defendant received a fair trial free from prejudicial error.

Prior to trial, defendant moved to suppress evidence of the hashish as well as the heroin found in the suitcase on the grounds that both her purse and suitcase were illegally searched and seized. After conducting an evidentiary hearing on these matters, the trial court made detailed find-

ings of fact and concluded that the controlled substances were admissible into evidence.

Defendant first argues that she was unconstitutionally seized by law enforcement officers at the door of the airport terminal; that her acquiescence to SBI Agent Turbeville's request to search her purse was coerced by her illegal seizure and that the hashish seized from her purse was tainted by this illegal seizure and that the trial court therefore erred in declaring the hashish admissible evidence.

This Court's scope of review of an order denying motions to suppress evidence is "whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." State v. Cooke, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). We conclude that the trial

judge here made findings of fact amply supported by the evidence; and that these findings of fact support admission of the seized contraband.

These findings of fact are summarized below:

> Terry Turbeville has been a drug agent for 7 years and has worked at the Raleigh-Durham Airport (hereinafter Airport) with the Drug Interdiction Unit since October 1981. During the first part of January 1982, Turbeville received information from Det. Jimmy Privette of the Raleigh Police Department that defendant and/or her husband, Elbert Porter, were bringing heroin into the Airport from New York City. Det. Privette indicated that the couple was transporting the drugs on their person or in their luggage; and that they usually traveled during the latter part of the week. He provided Turbeville with photographs of several persons, including the defendant. Also during the first part of January 1982, Turbeville met with a confidential informant. He asked the informant if he knew or had heard anything about narcotics coming through the Airport. The informant then continued, "You know they've been bringing it through Raleigh-Durham and usually come back on Thursday and Friday." This informant had always given Turbeville reliable information. In fact, he had given Turbeville information regarding drugs and seizures of drugs 3 or 4 times.

On 21 January 1982 Turbeville was working at the Airport. While waiting at the Eastern Airlines gate for a 4:00 p.m. flight from New York, Turbeville spotted Elbert Porter and another man. The two men appeared to be waiting for someone, but no one met them when the plane arrived. After checking at the Eastern ticket counter, the two men left.

Sometime after 4:00 p.m. Turbeville called Det. Privette and informed him that Elbert had been at the Airport and appeared to be waiting for someone. He told Privette that the next scheduled flight from New York was 9:00 p.m. and requested police assistance for this flight.

By 8:30 p.m. 7 law enforcement officers were awaiting the arrival of the 9:00 p.m. flight. When the plane landed, defendant disembarked and entered the lobby of the terminal. She was carrying a purse and a box. As the defendant passed through the main lobby she handed the box to the gentleman who had accompanied Elbert to the Airport. No words were exchanged. As defendant neared the exit of the lobby, the man returned the box to her and headed toward the baggage area. Sgt. Peoples of the Raleigh Police Department then approached defendant identified himself and said, "How are you doing Pearl?" Turbeville approached defendant from behind, introduced himself and showed defendant his SBI credentials. Turbeville then asked defendant for her plane ticket. She responded that she must have left it on the

plane. At this time people were gathering around and going in and out of the lobby. Turbeville asked defendant if she would like to go to his office and continue looking for identification. Defendant said okay. Before the 9:00 p.m. flight Turbeville had checked with Eastern Airlines and had discovered that defendant's name was on neither passenger list for the flights originating in New York.

When defendant reached Turbeville's office, Turbeville informed her that he was conducting a narcotics investigation and would like her cooperation. He then asked if he could look into her purse. Defendant said yes and handed the purse to him. Turbeville asked defendant if she had check-on luggage and she replied that she did not. Turbeville discovered a tinfoil packet in defendant's purse. He opened the packet, showed it to Det. Liggins and asked, "What's this?" Defendant replied, "That is Hash!" I forgot that it was in there."

While in the office Turbeville was informed by an officer that a suitcase tagged "Barbara Williams" had been left on the baggage platform. Turbeville had previously learned that a Barbara Williams was listed as a passenger who missed the 4:00 p.m. flight and as a passenger on the 9:00 p.m. flight. Turbeville had Barbara Williams paged and no one responded. He also checked the telephone book and called a Barbara Williams listed therein. This person indicated she had no luggage at the Airport. Turbeville showed defendant this suitcase and she denied it was hers. Defendant was then arrested for possession of hashish. She

indicated she wanted a lawyer and no further questions were asked. Defendant was taken before a magistrate. After a warrant for the misdemeanor was issued, defendant was released on bond.

At 2:04 a.m. on 22 January 1982, Turbeville and Det. O'Shields obtained a search warrant to search the suitcase. Plastic bags containing 27.9 grams of heroin were found inside.

At no time was defendant given the Miranda warnings. Turbeville testified that he would not have let defendant leave the Airport after he stopped her at the exit door. No one told defendant she had a right to leave without conferring with the officers. None of the officers present at the Airport were wearing uniforms and no weapons were ever displayed. Defendant testified that she knew 2 of the officers; that she did not believe she was free to leave and that she forgot she had hashish in her purse.

Based upon these findings of fact the trial court concluded:

10. Agent Turbeville, at the time of the defendant disembarking from New York Kennedy flight on Eastern Airlines at 9:00 p.m. had a reasonble suspicion of criminal activity that involved illicit drugs arriving at the Raleigh-Durham Airport with someone connected with Elbert Porter; that Pearl Porter, wife of Elbert Porter, could probably be one of the persons engaged in the criminal activity based on information given

the agent by the confidential informant and Detective Privette; that Agent Turbeville made a legitimate, temporary, detention of the defendant in the process of accosting her in the lobby of airport terminal and subsequently asking her if she would go to the office; that the defendant readily went with the officers to the office, forty feet away, in a spirit of voluntary cooperation, she believing that as of that time she had nothing to lose, or fear; that the consent to the search of the pocketbook was in the same spirit of voluntary cooperation, she believing at the time that she had nothing to fear or lose. There is exceptionally clear evidence of consent.

. . . .

12. All the believable testimony, and the totality of all the circumstances, point to the one conclusion that Agent Turbeville had probable cause to believe that the defendant was trafficking in some form of illicit narcotic drugs, controlled substances. He had a reasonable suspicion, based on articulable and objective facts, that Pearl Porter was involved in criminal activity.

The judge further concluded:

The defendant consented to the search of her pocketbook because she thought she had nothing to lose. She had a genuine momentary lapse of memory that she still had any hash in her purse. It was the heroin she was worried about, and none of it was on her person, or checked as luggage in her name, nor

within her reach or grasp, as she was accosted in the lobby, and while she was inside the office with the officers.

The findings of fact show and the trial judge properly concluded that defendant's first encounter with the officers at the Airport was an investigative stop and not a seizure. In Terry v. Ohio, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968), the United States Supreme Court established that a reasonable investigative stop did not offend the Fourth Amendment. In a recent airport search and seizure case, the Court concluded that federal agents' conduct in initially approaching the respondent and asking to see her ticket and identification was a permissible investigative stop under the standards of Terry. U.S. v. Mendenhall, 446 U.S. 544, 64 L.Ed. 2d 497, 100 S.Ct. 1870 (1980). The facts and language in this case are pertinent to our determination of the case on appeal.

In Mendenhall, agents observed a woman

whose conduct appeared to be characteristic of persons unlawfully carrying narcotics. The agents approached her, identified themselves as federal agents and asked to see identification and an airline ticket. The agents noted a discrepancy between the names on her drivers' license and ticket. They returned the items to her and asked if she would accompany them to their office. She agreed. She also consented to a search of her purse after the agents told her she had a right to decline the search. Mendenhall later consented to a search of her person. Drugs were discovered in her underclothing. The Court concluded that on these facts no "seizure" occurred. The Court noted;

> The events took place in the public concourse. The agents wore no uniforms and displayed no weapons. They did not summon respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's identification and ticket. Such conduct,

> without more, did not amount to an intrusion upon any constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official (citations omitted.) In short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agents' initial approach to her was not a seizure.

Id. at 510. The Court concluded "that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Id. at 509.

In the case on appeal, defendant was approached by two or at the most three law enforcement officers. She knew two of the officers and they did not use a threatening tone of voice or display a weapon. The evi-

dence further showed, and the trial court found, that defendant consented to the search of her purse because she thought she had nothing to lose. She simply forgot about the hashish in her purse.

We note that the trial court concluded that even if defendant was seized at the Airport, her seizure was not unlawful. Any seizure must at least be supported by reasonable and articulable suspicion that the person seized is engaged in criminal activity. Reid v. Georgia, 448 U.S. 438, 65 L.Ed. 2d 890, 100 S.Ct. 2752 (1980). The evidence shows that Agent Turbeville clearly had a reasonable suspicion that defendant was engaged in criminal activity.

Several weeks prior to defendant's arrest, Turbeville had received evidence from a reliable informant that defendant and/or her husband werebringing drugs into the Airport from New York on Thursdays or Fridays. As predicted by this informant,

defendant disembarked from a plane originating in New York on a Thursday. Before approaching defendant, Turbeville had learned that defendant was not listed on the passenger list for the flight and could conclude from this that she was traveling under an assumed name. She did not have a plane ticket with her and appeared to have no luggage. Since defendant voluntarily consented to the search of her purse while being justifiably detained on reasonable suspicion, the hashish recovered in the search is admissible against her.

Defendant next argues that the warrantless seizure of the brown leather fold-up suitcase tagged with the name Barbara Williams was unconstitutional. The suitcase was seized from Eastern Airlines' unclaimed baggage area after hashish was discovered in defendant's purse.

In a recent decision, the U.S. Supreme Court held that Terry principles could be

applied to justify a warrantless seizure of baggage on less than probable cause. U.S. v. Place, U.S. 77 L.Ed 2d 110, S.Ct. (1983). Place was stopped by law enforcement officers because of his suspicious behaviour. After he refused to consent to a search of his luggage, the agents informed him that they were taking the suitcase to a federal judge to obtain a search warrant. The agents instead transported the suitcase from New York's LaGuardia Airport to Kennedy Airport where a "sniff test" by a narcotics detection dog proved positive. Ninety minutes had elapsed since the seizure of the luggage. The Court held that the drugs obtained from the subsequent search of the luggage was inadmissible because of the length of detention of Place's luggage.

Unlike the facts in Place, Agent Turbeville had probable cause to seize the brown leather suitcase pending issuance of a search warrant to examine its contents. The

information received from the reliable informant, the hashish found in defendant's purse after her voluntary consent, the evidence that defendant was traveling under an assumed name, the evidence that the suitcase was tagged with the name Barbara Williams, and the evidence that a passenger with the same name was listed on the passenger lists as having cancelled the earlier New York flight and arriving on the later flight clearly gave the officers probable cause to seize the suitcase.

The trial judge concluded that since defendant denied that the luggage was hers, she had no standing to object to the search of her suitcase following its seizure. Defendant excepts to this conclusion. Because the search was conducted pursuant to a properly issued search warrant the conclusion that defendant had no standing to object to the search is not material to the court's decision to deny suppression of evidence

seized from the search.

Defendant argues that the trial court erred in admitting into evidence Eastern's reservation computer printout for the two flights arriving from New York City on 21 January 1982. She bases this assignment of error on the State's failure to lay a proper foundation. We find no support for this argument.

Robert Taylor, an employee with Eastern, testified that he works with the computer system; that the system is part of Eastern's business management service and that the information retained in the system is prepared in the regular course of business. After briefly explaining how information is placed in the computer, Taylor testified that Agent Turbeville approached him on 21 January 1982 and requested information on the two Eastern flights from New York arriving that day. Taylor made a printout of the two passenger lists showing

reservations and cancellations. At trial Roberts identified copies of these printouts he had made for Turbeville. The State, through Taylor's testimony, laid a proper foundation for the introduction of the computer printouts. See State v. Springer, 283 N.C. 627, 197 S.E. 2d 530 (1973).

Defendant's argument that the State failed to lay a proper foundation for the admission of fingerprint evidence is also without merit. Agent Neuner, an expert in latent fingerprint identification, testified that on 22 January 1982 he examined the suitcase and its contents for fingerprints. He compared the fingerprints lifted from these items with a fingerprint identification card bearing defendant's name and found that some of the latent fingerprints matched those on the card.

Defendant specifically argues that no foundation was laid for this testimony, because no witness identified defendant as

the person who made the inked impression on the fingerprint card. Defendant has obviously overlooked the testimony of an employee of the City-County Identification Unit. This witness testified that he fingerprinted defendant when she was arrest on the drug charges; and that the fingerprint card bears defendant's print and was forwarded to the SBI.

Defendant has assigned error to the trial court's failure to dismiss the charge of trafficking in heroin. She contends that the fingerprint evidence was unsubstantial, and that Eastern Airlines had sole and exclusive possession of the suitcase containing the heroin.

When considering a motion to dismiss for insufficient evidence, the court must consider all the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference to be drawn from the evidence. The evidence, when viewedin this light, shows that defen-

dant was traveling under an assumed name; that she denied having any luggage; that the suitcase was tagged with the name "Barbara Williams"; that a passenger with this name had cancelled her reservation on the afternoon New York flight and arrived on the evning flight; that "Barbara Williams" was paged but no one claimed the suitcase; that defendant's fingerprints were found on some of the contents of the suitcase and that one of the officers recognized a night-gown in the suitcase as identical to one he had seen on defendant prior to 21 January 1982. We find no error in the failure to grant defendant's motion.

In defendant's final assignment of error, she attacks the constitutionality of G.S. 90-95(h)(4), (5) and (6). This same argument was posed by defendant's attorney in State v. Willis, 61 N.C. App. 23, 300 S.E. 2d 420 (1983), wherein this court concluded that these statutes are

not violative of the United States or North Carolina Constitutions.

No error.

Judges WEBB and HILL concur.

APPENDIX B

No. 630P83 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)	JUDGMENT DISMISSING APPEAL ON MOTION OF ATTORNEY GENERAL AND DENYING PETITION FOR DISCRETIONARY REVIEW (8310SC132)
v.	)	
PEARL JEAN MCNEIL PORTER	)	

****

Upon consideration of the Defendant's notice of appeal from the North Carolina Court of Appeals, filed in this matter pursuant to G.S. 7A-30, and the Attorney General's motion to dismiss the appeal for lack of a substantial constitutional question and upon consideration of the Defendant's petition for discretionary review of the decision of the North Carolina Court of Appeals, pursuant ot G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

Attorney General's motion to dismiss the appeal is

"Allowed by order of the Court in conference, this the 10th day of January, 1984.

s/Frye, J.
For the Court"

Defendant's petition for discretionary review is

"Denied by order of the Court in conference, this the 10th day of January, 1984.

s/Frye, J.
For the Court"

Therefore, it is considered and adjudged further that Defendant do pay the sum of Nine and no/100 Dollars ($9.00) and that execution issue therefor.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of January 1984.

J. GREGORY WALLACE
Clerk of the Supreme Court

Copy to:
North Carolina Court of Appeals
Loflin & Loflin, Attorneys at Law
Mr. Lester V. Chalmers, Jr., Special
Deputy Attorney General
Mr. J. Randolph Riley, District Attorney
Mr. Russell Nipper, Clerk of the Superior
Court

CERTIFICATE OF SERVICE

I, Thomas Franklin Loflin III, a member of the Bar of the Supreme Court of the United States and counsel of record for Pearl Jean Porter, Petitioner herein, hereby certify that on March 23, 1984, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on the opposing party herein as follows:

On the State of North Carolina, Respondent herein, by depositing said three copies in the U.S. Post Office in Durham, N.C., with first-class postage prepaid, properly addressed to said Respondent's counsel of record at his last-known mailing address as follows: Lester C. Chalmers, Jr., Esquire, Special Deputy Attorney General for the State of North Carolina, N.C. Department of Justice, P.O. Box 629, Raleigh, N.C. 27611.

I further certify that all parties required to be served have been served.

Dated March 23, 1984.

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